UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH JAMARK HOUSTON,

Defendant.

_____/

CASE No. 1:18-cr-177

HON. ROBERT J. JONKER

OPINION AND ORDER

Defendant Houston moves to suppress evidence of a firearm and ammunition found on his person after a warrantless arrest at his residence on August 5, 2018. (ECF No. 27). Police watched Mr. Houston walk from his front driveway into his home; close and lock his front door; turn off the lights; and pull down shades once he saw police approach the house. Lansing police convinced Mr. Houston to walk out of his house by opening his front door and threatening to release a police dog into the house to bite him if he did not leave on his own. The officer testified at the evidentiary hearing that he did not actually intend to follow through on the threat. But of course Mr. Houston accepted the threats from a uniformed police officer at face value, especially after the officer prodded his German Shepherd to bark. The lie—or psychological tactic, as the officer described it—worked, but the Court concludes there was no warrant, exigency or other lawful basis for police to constructively enter Mr. Houston's home by "barking" him out of it. Mr. Houston's motion to suppress is **GRANTED.**

FACTUAL AND PROCEDURAL BACKGROUND[1]

Shortly after 4:00 a.m. on the morning of August 5, 2018, Tara Brandman and Hannah Robeson, two police officers with the City of Lansing Police Department, were dispatched to 718 Ionia Street in Lansing, Michigan to investigate a report of an assault. When they arrived, the officers made contact with the victim, Gaybrielle Hollis. Ms. Hollis was being treated by medics, who had arrived only moments before the officers. Ms. Hollis appeared upset. Officer Brandman noticed Ms. Hollis had several abrasions and lacerations on her body, especially around her head and face. The weave that had been glued in Ms. Hollis's hair had also been nearly pulled out. Ms. Hollis told Officers Brandman and Robeson that she had been assaulted earlier that morning by her boyfriend, Defendant Houston, outside the residence they shared several blocks away at 800 West Lapeer Street.[2] Ms. Hollis later explained that the two had been together for eight years, and that Mr. Houston had never acted this way before.

Ms. Hollis explained she had been driving home earlier that morning and as she arrived, Mr. Houston got into her car from the front passenger-side window and assaulted her. Ms. Hollis got out of the car to escape the assault, but after moving only a few feet away Mr. Houston grabbed her by the hair, pulled her to the ground, and continued to hit her. Ms. Hollis dropped her phone,

[1] The Court's factual findings are based on the evidence submitted at the evidentiary hearing. Many of these facts are undisputed. To the extent any facts are disputed, the Court finds that the facts recited here are established by a preponderance of the evidence.

[2] These facts are based on the testimony of Ms. Hollis and the officers as well as on the recordings of a body camera that Officer Brandman was wearing. The defense objects to some of the videoclips offered by the government on hearsay grounds, though it concedes the Court has discretion to admit hearsay evidence at a suppression hearing. (ECF No. 40, PageID.113). The Court overrules the objection, and admits all the evidence the government relied on during the hearing for whatever weight it may have. The Court notes, furthermore, that at least some of the objected to statements probably qualify as excited utterances and, therefore, are admissible as an exception to the hearsay rule. Moreover, Ms. Hollis testified at the evidentiary hearing and was subject to cross-examination on her statement.

and Mr. Houston picked it up and stated he would look through it. Mr. Houston suspected she was seeing someone else, and he wanted to find out who it was. After the assault was completed, Ms. Hollis fled to 718 Ionia. She did not know anyone at the address, but she was allowed inside where she called some of her family members and then the police.

After describing the incident to the officers, Ms. Hollis reported she did not know where Mr. Houston had gone after assaulting her. She thought that perhaps Mr. Houston had gone to the home of his grandmother. She also told the officers that Mr. Houston was wearing blue jeans and no shirt. While Officers Brandman and Robeson were investigating, an acquaintance of Ms. Hollis arrived to pick Ms. Hollis up.[3] The acquaintance reportedly told Officer Brandman that Mr. Houston had vandalized her vehicle by scratching the windshield and denting the hood. She also told Officer Brandman that Mr. Houston was at 800 West Lapeer because he had called her and told her that he was "at home."

At some point Officer Kenneth Schafer, also of the Lansing Police Department, arrived at the Ionia Street address to assist in the investigation. Officers Robeson and Schafer, Ms. Hollis, and her acquaintance then spoke outside. The officers concluded they had probable cause to make an arrest for domestic assault and indicated they would go to 800 West Lapeer to arrest Mr. Houston.[4] During the conversation, Ms. Hollis told the officers that she was scared to go home that night and questioned how long the officers might hold Mr. Houston. Officer Schafer then asked Ms. Hollis whether the officers had her permission to go inside her home. Ms. Hollis

[3] The name of this individual is not in the record.

[4]Both Officer Brandman and Officer Robeson testified they believed they had probable cause that Defendant had committed a domestic assault. Officer Robeson added that she also believed there was probable cause to arrest Defendant for a robbery. Officer Robeson may have believed that, but no other involved officer did. Nor did any officer—including Officer Robeson—assert that as a basis for the warrantless arrest that morning. Moreover, the Court finds there was no probable cause to arrest Mr. Houston for robbery.

responded in the affirmative, and volunteered the keys to the residence. Ms. Hollis gave the keys to Officer Robeson, and also told the officers she wanted to get her phone back.

Before leaving, the officers asked Ms. Hollis whether Mr. Houston would pose any problem to the officers. Ms. Hollis responded that he would not resist them because Mr. Houston had a job and would not want to risk losing the job. The officers then left to go to 800 West Lapeer. On their way, and before arriving at the residence, the officers received more information about Mr. Houston from other officers. They were provided a picture of Mr. Houston as well as a criminal history report that indicated Mr. Houston had prior convictions.[5] Based on this added information, Officer Robeson requested that a canine unit be dispatched, and then proceeded to the scene with the other officers.

Officer Brandman testified that she was about one and a half houses away from 800 West Lapeer when she encountered an individual who was wearing blue jeans and no shirt and who otherwise matched the description of Mr. Houston that had been provided to her. The person was in a driveway adjacent to the home, and it appeared to the officer that he was attempting to enter a vehicle that was parked in the driveway. Officer Brandman illuminated the individual with her flashlight and ordered him, twice, to stop what he was doing and to show her his hands. But rather than comply, the person ran inside the house through the front door. He closed and locked the door behind him, turned off the lights, and then closed the windows and window shades. Officer Brandman went around to the rear side of the residence to make sure that the person did not leave

[5] Defendant was previously convicted in this district on a firearm possession charge. *United States v. Houston*, No. 13-cr-05 (W.D. Mich. June 21, 2013). Mr. Houston's PSR from that case reports State convictions for possession of controlled substances, impaired and careless driving, and attempted assault / resist / obstruct on a police officer.

through the back while Officer Robeson and Schafer attempted to make contact with the person by knocking on the front door.

Subsequent events established that the individual was Mr. Houston, but the officers concede they were not able to positively identify the person as Mr. Houston before he entered the home, or at any time before the officers "barked" the individual out of the home. At most, the individual they saw was consistent with the description they had for Mr. Houston. Officer Brandman's recollection was also inconsistent with the recordings that were later shown during the hearing. For example, she testified the individual ran up a white porch into the residence, however the videoclip that was shown at the hearing established that 800 West Lapeer did not have a white porch and that the porch the officer believed belonged to 800 West Lapeer was actually attached to a neighboring residence. In any event, once the individual—Mr. Houston or otherwise—was in the house, the officers agree the situation and the individual inside was contained and no longer presented an ongoing threat to the victim several blocks away.

After a few minutes Officer Brian Rendon arrived with "Mac," a German Shephard. The officers briefly discussed the situation and then decided to do a "bark out." Officer Rendon explained that a "bark out" is a tactic or psychological deterrent that is used to try to get a subject to come out of an area, in this case a home. According to the officer, a "bark out" minimizes the use of force as well as the risk of officer injury or liability. During the "bark out" an officer makes announcements and commands a subject to exit an area, while signaling the canine to bark, and making statements to the effect that the subject will get bit by the canine. Despite warning a subject that he or she risks being bitten by a police dog if the subject fails to comply, Officer Rendon testified that an officer generally will not release the canine during a "bark out" and that he did not actually intend to do so this time. Officer Rendon further testified that Lansing officers

will sometimes perform a "bark out" outside an area they did not have lawful authority to enter: that is, an instance where there was no warrant, consent, or exigency.[6] In this case, Officer Brandman testified that the situation was secure, and that officers could have requested a warrant, but that they did not want to wake up a judge. Needless to say, that concern does not amount to any exigency.

Having decided to perform a "bark out," the officers used Ms. Hollis' key to open the front door to the residence. Officer Rendon then conducted a "bark out" by commanding Mr. Houston to come out, announcing to Mr. Houston that he risked being bit by a police dog, and signaling Mac to bark. In fact, Officer Rendon repeated "you will be bit." Shortly thereafter, Mr. Houston came to the door and onto the porch of his home. He was taken into custody and arrested. Officers Brandman and Robeson then performed a search incident to arrest, where 9mm ammunition and a .25 caliber Titan semi-automatic pistol was found in Mr. Houston's pants pockets. On August 14, 2018, a grand jury returned an indictment charging Mr. Houston with being a felon in possession of a firearm and ammunition.

[6] This Court has, in the past, been critical of law enforcement techniques used as a means to circumvent the Fourth Amendment's warrant requirement, especially when the tactics involve police officers lying to the face of citizens. *See, e.g.*, *United States v. Boyd*, No. 1:09-cr-192 (W.D. Mich. June 29, 2011) (unpublished). In that particular case, this Court expressed its concern about a "knock-and-talk" technique that was frequently implemented with the purpose and effect of having officers lie to citizens to gain entry to their homes. The false statements from officers to citizens that are an inherent part of the "bark out" raise similar concerns. The Court recognizes and appreciates the need for law enforcement to use ruses as part of standard undercover investigative techniques. But posing as someone other than an officer in an effort to uncover evidence of criminal activity is quite different than having uniformed police officers lie to citizens as part of officially sanctioned police practice. Regular use of such tactics erodes citizen trust in the honesty and integrity of law enforcement. It also sets up a troubling incongruity: a citizen who lies to the officer is guilty of a criminal offense, but the officer who lies to the citizen is just engaging in a psychological tactic.

DISCUSSION

1. Legal Standard

"The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (citation omitted); *see Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (quotation marks and citation omitted); *United States v. Thomas*, 430 F.3d 274, 276 (6th Cir. 2006) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant"). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. "There are a few well-defined and carefully circumscribed circumstances in which a warrant will not be required." *United States v. Williams*, 354 F.3d 497, 503 (6th Cir. 2003). These are situations of exigent circumstances or where consent is obtained by an individual with authority. *See Smith v. Stoneburner*, 716 F.3d 926, 929-30 (6th Cir. 2013) (holding that under the Fourth Amendment, a police officer "may not enter a private home without a warrant absent an exigency or consent").

"The Sixth Circuit has identified four areas wherein the Supreme Court recognizes exigent circumstances: hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a subject's escape, and risk of danger to the police or others." *United States v. Johnson*, 457 F. App'x 512, 515 (6th Cir. 2012) (citing *Williams*, 354 F.3d at 503; *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994)). "Under the hot pursuit exception, an officer may chase a suspect

into a private home when the criminal has fled from a public place." *Stoneburner*, 716 F.3d at 931 (citing *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967)); *see also United States v. Santana*, 427 U.S. 37, 43 (1976) ("[A] suspect may not defeat an arrest which has been set in motion in a public place[.]").

A second "jealously and carefully drawn exception [to the warrant requirement] recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (internal quotation marks and citations omitted). "'Consent searches are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity.'" *Fernandez v. California*, 571 U.S. 292, 298 (2014) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231-32 (1973)). The consent exception requires a free invitation into the home, rather than mere acquiescence to the officer's entry. *Stoneburner,* 716 F.3d at 930 (citing *United States v. Moon*, 513 F.3d 527, 538 (6th Cir. 2008)). Where there are multiple occupants sharing a residence, each "assumes the risk that 'any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another.'" *Fernandez*, 571 U.S. at 301 (quoting *Randolph*, 547 U.S. at 111). However "a physically present [co-]inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph*, 547 U.S. at 122-123. "The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations[.]" *Randolph*, 547 U.S. at 111.

2. There was no Exigency Justifying Entry to 800 West Lapeer

When the Lansing police officers constructively entered 800 West Lapeer on the morning of August 5, 2018, there was nothing "hot" about the officers' pursuit of Mr. Houston.[7] To the contrary, the officers' actions were preceded by an opportunity for cool and careful deliberation unimpeded by any emergent considerations.[8]

"What makes the pursuit 'hot' is 'the emergency nature of the situation,' requiring 'immediate police action.'" *Stoneburner*, 716 F.3d at 931 (quoting *Cummings v. City of Akron*, 416 F.3d 676, 686 (6th Cir. 2006). Circumstances requiring "immediate police action" include whether the suspect was armed, whether he was violent, an ongoing public nuisance, information that someone inside the residence was injured or needed immediate emergency aid, and the severity of the crime. *See id.* at 931-932. None of the above circumstances are present in this case. Mr. Houston was armed, but it was not until after the officers had arrested Mr. Houston that this was known to them.[9] While the officers were aware that Mr. Houston had a criminal history, Ms. Hollis told them that Mr. Houston would not be violent. And in fact Mr. Houston was not violent when the officers initially made contact with him outside his residence. Nor was there any

[7] The government has not conceded that the officers entered the residence since the officers never physically crossed the threshold of the residence. The Court agrees with the defense, however, that the officers' conduct amounted to a constructive entry for purposes of the Fourth Amendment inquiry. "Although there was no direct policy entry into the [defendant's] home prior to [the defendant's] arrest, the constructive entry accomplished the same thing[.]" *United States v. Morgan*, 743 F.2d 1158, 1166 (6th Cir. 1984). They used a key to open a locked front door, and threatened to release a police dog inside the home to find and bite Mr. Houston if he declined to come out on his own.

[8] Moreover, the officers were not even sure the person who walked into the home was Mr. Houston, though they certainly had probable cause to believe that.

[9] The body camera tape of his arrest reveals that even Mr. Houston had evidently forgotten about the gun in his pants' pocket, whether through stress or intoxication. He never used or threatened to use the firearm during the encounter. And he seemed genuinely surprised when officers pulled the gun out of his pocket.

ongoing public nuisance, or information about any individual other than Mr. Houston inside the home. The victim was safe and secure off site, as the officers knew.

The officers' own conduct on the morning of August 5, 2018 belies the government's present claim of exigency. After Mr. Houston ran into his residence, Officers Brandman, Robeson, and Schafer did not immediately follow. The officers instead regrouped and waited for the arrival of Officer Rendon and Mac. At that point, the situation was relatively calm and stable. Mr. Houston was contained inside his residence and the officers were positioned both at the front and the rear of the residence such that they would have seen any attempt to flee. No circumstance existed requiring the officers to act before they could obtain a warrant. Then, when the officers ultimately decided to compel Mr. Houston's exit from the residence via the "bark out," it was not done because of any circumstance requiring swift action, such as a threat to public safety or the imminent destruction of evidence. Rather it was because the officers did not wish to wake up a judge to obtain a warrant. The desire to avoid a tired and perhaps irritable judge, however, is not a circumstance justifying immediate police action.

This situation is much different than that faced by the officers in *Santana* and *Johnson*, the two cases relied on by the government. In *Santana*, the Supreme Court held that the defendant was unable to frustrate her arrest by retreating into her home after being confronted by the police in a public area. *United States v. Santana*, 427 U.S. 38, 43 (1976). To be sure, like in *Santana*, when the officers initially sought to make contact with the person they believed to be Mr. Houston, the suspect was in the driveway outside his house. But when the officers in *Santana* followed the defendant inside the residence, they had a justification that is not present here, namely, "a realistic expectation that any delay would result in destruction of the evidence." *Id.* Unlike *Santana*, there was no risk of destruction of evidence in this case. There was no risk, for example, that evidence

relating to the assault would be lost. Ms. Hollis was off site, and the officers observed her condition before proceeding to the scene. Nor was there any reasonable risk of damage or destruction of Ms. Hollis' cellphone. Mr. Houston wanted to use Ms. Hollis's phone to find evidence his girlfriend was cheating on him, and therefore had no reason to destroy the device. And even if Mr. Houston wanted to destroy the phone, it is unlikely he could have made it completely disappear. *See Stoneburner*, 716 F.3d at 932 (noting the practical difficulties of leaving no evidence of a phone charger behind by a defendant cornered in his home and seeking to destroy the charger). Finally, no officer had articulated to Mr. Houston that he was under arrest before he went into his home. Indeed, the officers had not positively identified him at the time.

The government correctly points out that the officers' decision to surround the home and wait for backup before entry does not automatically render the hot pursuit exception inapplicable. For example, in *United States v. Johnson*, the court found the hot pursuit exception applied after officers waited for backup before entering that house. *United States v. Johnson*, 106 F. App'x 363, 367 (6th Cir. 2004). But in *Johnson*, the arresting officers knew the suspect was armed and dangerous: he had discharged a firearm in the officers' presence before retreating inside the house. The officers further were informed residents of the home included children. As the court put it: "[n]ot knowing the number of occupants in the house, whether they included children or if they had been taken hostage, or the identity of the shooter and whether he also lived there, the officers forced open the front door and entered the residence." *Id.* at 365. These are precisely the type of circumstances requiring immediate police action that are lacking here. The government's reading of these cases "incorrectly suggests that the hot-pursuit exception to the warrant requirement applies any time a suspect retreats into his home, no matter the circumstances." *United States v. Corder*, 724 F. App'x 394, 402 (6th Cir. 2016). To the contrary, *Santana* and *Johnson* are entirely

consistent with *Stoneburner*: when officers, relying on the hot pursuit exception, decide to go into a home without a warrant, there must be exigent circumstances justifying that immediate action. There are no such circumstances here.

The Court recognizes that domestic assault is a serious problem and understands that the officers' justifiable concern to protect Ms. Hollis was foremost in their minds. The seriousness of the crime matters. *See Stoneburner*, 716 F.3d at 930-931 (noting an officer relying on the hot pursuit exception must also overcome the "presumption against warrantless entries to investigate minor crimes or to arrest individuals for committing them" and that "to arrest for a minor offense the presumption against entry [is] difficult to rebut") (internal quotation marks and citation omitted); *see also Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (requiring courts to weigh the "gravity of the underlying offense" when considering whether any exigency exists). Here, the government contends that the officers had probable cause to arrest Mr. Houston not only for the misdemeanor of domestic assault (MICH. COMP. LAWS § 750.81(2)) but also for felonies relating to Mr. Houston's theft of Ms. Hollis' cellphone during the assault and the damage to the car of Ms. Hollis' acquaintance. The Court concludes the officers had probable cause to arrest only for the misdemeanor offense. Ms. Hollis was clear about her relationship with Mr. Houston, and was equally clear that he had assaulted her on the morning of August 5th, 2018, by hitting her, then pulling her by the hair to the ground, and continuing to hit her. The assault, moreover, was plainly the incident that spurred the officers' decision to arrest Mr. Houston. The testimony relating to the felonies, on the other hand, was much more nebulous and cursory. No testimony, for example, was offered by the individual who said Mr. Houston had vandalized her car. Officer Brandman only testified, in a conclusory manner, that the car sustained over a thousand dollars of damage and it was not clear whether Officer Brandman saw the vehicle or was relying on the individual's

reports of what had happened. Testimony relating to the cellphone was similarly vague. Ms. Hollis gave somewhat inconsistent answers relating to when she let go of her phone, and when Mr. Houston picked it up during the scuffle. More importantly, nothing suggests Mr. Houston had any intention to deprive Ms. Hollis of the phone permanently; he just wanted to look at it to confirm his suspicion that she was cheating on him. Accordingly, the Court concludes the officers only had probable cause to arrest Mr. Houston for the completed misdemeanor assault.

That the officers only had probable cause to make an arrest for a misdemeanor offense, however, does not necessarily render the hot pursuit exception inapplicable. *See Johnson,* 106 F. App'x at 367 (stating that "the fact that this case involves the commission of misdemeanors, rather than the more usual situation involving felonies, does not render the hot pursuit doctrine inapplicable"). Domestic assault is of course a serious offense and as the cases cited in both the government and the defense briefs illustrate, in an appropriate case the offense may justify a hot pursuit. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1039 (9th Cir. 2007) (hot pursuit justified when domestic assault victim was at the scene and needed medical attention). But the facts do not support hot pursuit here. The officers had not positively identified the suspect as Mr. Houston, the suspect had not made any threats to law enforcement or brandished a firearm, and he was contained. The victim, moreover, was safely away from the scene and presumably could have stayed there, or with her acquaintance, while the police obtained a warrant.

In sum, the Court finds no circumstances justifying immediate police action in this case. The pursuit of Mr. Houston, therefore, was not hot. *Cf. United States v. Curzi*, 867 F.2d 36, 40 (1st Cir. 1989) ("[T]his is not a case where officers in hot pursuit cornered dangerous criminals and were compelled to act on the spur of the moment. Rather . . . the [officers] enjoyed the luxury of time and the opportunity for careful reflection. Instead of acting in the heat of the chase, they

were able to indulge in cool premeditation as to the tactics to be employed in [Defendant's] arrest."). The government does not argue that any other exigency exists, and so the Court concludes that this carefully crafted exception to the warrant requirement does not apply on these facts.

3. Mr. Houston was a Present and Objecting Co-Tenant

Even if no exigency existed, the government argues that the officers were lawfully permitted to enter 800 West Lapeer to arrest Mr. Houston because they had the consent of one of its occupants, Ms. Hollis.

As an initial matter, there is no real dispute that Ms. Hollis had authority to consent to a search of home by the officers, and that she did allow the officers to go into her residence for at least some purpose. Ms. Hollis testified that she lived at the house with Mr. Houston; there were no other residents, and the two split household expenses evenly. The totality of the circumstances, furthermore, demonstrates that Ms. Hollis's consent was freely and voluntarily given. Ms. Hollis plainly verbally agreed to a search of the residence, and volunteered the keys to the residence. The videotape of the conversation with Ms. Hollis likewise establishes the absence of any duress or coercion. *See United States v. Canipe*, 569 F.3d 597, 602 (6th Cir. 2009) ("The government bears the burden of demonstrating by a preponderance of the evidence, through 'clear and positive testimony,' that the consent was voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.").

The defense does not disagree that Ms. Hollis had authority to consent, and that her consent was freely and voluntarily given. Rather, the defense argues the police officers either (1) exceeded the scope of Ms. Hollis's consent or (2) that Ms. Hollis's consent was not effective as to Mr. Houston. The Court finds no merit in the first argument but does find merit in the second.

A. Ms. Hollis Gave Effective Consent to Search the Residence

The defense asserts that Ms. Hollis's consent was limited to only an entry of the residence, not a search; and that the keys were volunteered only because Ms. Hollis did not want the officers to break down the door. Because the officers' actions went beyond mere entry to include arrest and search of Mr. Houston with the "bark out," the defense argues the officers' conduct went beyond what was permissible under the Fourth Amendment. The Court disagrees that the officers exceeded the scope of Ms. Hollis's consent.

The controlling test is one of objective reasonableness. The Sixth Circuit has summarized the appropriate inquiry as follows:

> When law enforcement officers rely upon consent as the basis for a warrantless search, the scope of the consent given determines the permissible scope of the search. *Florida v. Jimeno,* 500 U.S. 248, 251-52, 111 S.Ct. 1801, 1803-04, 114 L.Ed.2d 297 (1991). The standard for measuring the scope of the consent given is objective reasonableness-"what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 251, 111 S.Ct. at 1803-04.

United States v. Gant, 112 F.3d 239, 242 (6th Cir. 1997). *See also United States v. Garrido-Santana*, 360 F.3d 565, 575-76 (6th Cir. 2004) (applying "reasonable person" standard to assess scope of consent"). Under this test, the Lansing officers' constructive entry of 800 West Lapeer did not exceed Ms. Hollis's consent. The request from the officers was open ended: a request for permission to go inside the house. And Officers Robeson and Schafer both explained that the request came up in the context of a discussion about going to the residence to arrest Mr. Houston. Ms. Hollis's response agreeing to the officer's request contained no limitation on the scope. She did not, for example, say when giving the officers the keys that she was doing so because she didn't want them to break down the door. Moreover Ms. Hollis's request that the officers retrieve her cellphone, combined with the context of the conversation, reflects an anticipation that the

officers would in fact make contact with Mr. Houston and place him under arrest.[10] "The scope of a search is generally defined by its expressed object." *Jimeno*, 500 U.S. at 241 (citing *United States v. Ross*, 456 U.S. 798 (1962). Here, the most natural purpose of the entry was the arrest of Mr. Houston. It was reasonable for the officers to conclude that Ms. Hollis's general consent included consent to go inside the residence to effectuate Mr. Houston's arrest.

B. Ms. Hollis's Consent was Not Effective as to Mr. Houston

The fact that the officers obtained valid consent from Ms. Hollis does not end the Court's analysis because "a physically present inhabitant's express refusal of consent" renders the consent invalid as to him. *Randolph*, 547 U.S. at 122-123. Here, Mr. Houston was both physically present and expressly refused consent.

When the officers approached Mr. Houston's home he was standing in the driveway, which qualifies as the home's curtilage. As the officers moved closer, he went into the home, locked the door, closed the windows, turned off the lights, and pulled the shades. Courts, including a panel from the Sixth Circuit, have concluded that consent was no longer valid once a defendant undertakes actions similar to those here—closing and locking a door, turning off lights, and closing windows. *See Bonivert v. City of Clarkson*, 883 F.3d 865, 875 (9th Cir. 2018) (concluding officers were not entitled to qualified immunity when co-tenant attempted to close the door on officers who had consent of co-tenant); *Cummings v. City of Akron*, 418 F.3d 676, 685 (6th Cir. 2005) (subject's "attempt to close the door constituted a termination of the consensual encounter, and communicated his lack of consent to any further intrusion by the officers"); *United States v.*

[10] Ms. Hollis seemed to want Mr. Houston jailed long enough to sober up and settle down. She definitely did not want to encounter him again that night. She did not express concern about being with him after that. In fact she said the two had been together for eight years, and that he had never done this before.

Williams, 521 F.3d 902, 907 (8th Cir. 2008) (co-tenant's consent "was no longer valid once [present and objecting co-tenant] slammed the door and put the dead bolt on.").

The cases relied on by the government are distinguishable. In *Moore*, for example, the defendant's fiancée consented to a search of the residence she shared with the defendant. But unlike this case, the defendant in *Moore* entirely failed to "engage in any affirmative conduct to physically prevent the police officers from coming inside the house." *United States v. Moore*, 770 F.3d 809, 814 (9th Cir. 2014). The defendant instead left the matter entirely to his fiancée, and accordingly lost out when she consented to a search in his absence. This is a far cry from the several affirmative acts Mr. Houston performed that signaled his objection. Actions can speak just as loud and clear as words. And looking to the actions of an individual is plainly consistent with giving weight to the customary social understanding when assessing reasonableness. *Randolph*, 547 U.S. at 121. Here a customary social understanding supports the view that Mr. Houston expressly objected to the officers' entry. Suppose I give my friend the keys to my house and tell him he can go inside and make himself at home until I arrive later. If that friend arrives and waves to my wife in the driveway, but then watches her walk quickly into the house, lock the door, close the window shades and turn off the lights, that friend would surely be a former friend if he tried to go inside! Express refusal can be unequivocal conduct, as well as unequivocal words. *Bonivert*, 883 F.3d at 875 (disagreeing with a defendant's argument that "express refusal" under *Randolph* means "verbal refusal").

This is especially true when officers themselves prevent or discourage the use of words during the encounter. The Supreme Court itself has suggested that a co-tenant's consent might not be enough "if there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121. The

Court later concluded that this dictum was best understood "to refer to situations in which the removal of the potential objector is not objectively reasonable." *Fernandez*, 571 U.S. at 302. Imagine the situation from Mr. Houston's perspective. He's entered his home, bolted his door, turned off his lights, pulled his shades and closed his windows. To any reasonable person, that set of actions would unequivocally express "stay out" just as clearly as a painted sign on the door or a verbal shout. Now the officers open the front door and threaten to release a police dog to bite him if he doesn't comply with the command to exit. Is it reasonable to expect Mr. Houston to test their resolve by shouting "stay out"? Of course not because it would risk exactly what the officers were threatening: attack from a police dog. It is not reasonable to threaten a citizen with being bitten by a dog, even if the threat is a ruse, to compel that citizen to leave the refuge of his home when the police have no lawful basis for entry, and the citizen has unequivocally expressed in words or actions that the police are not welcome inside.[11]

In light of the conduct demonstrating express refusal by Mr. Houston to the officers' entry, Ms. Hollis's earlier consent gave the officers "no better claim to reasonableness in entering than the officer[s] would have in the absence of any consent at all." *Randolph*, 547 U.S. at 114. Therefore Ms. Hollis's consent did not permit the officers' warrantless entry into the shared residence.

[11] This in no way means officers have an obligation to seek out co-tenants and ask their permission. *United States v. Ayoub*, 498 F.3d 532, 540 (6th Cir. 2007). It simply means officers may not unreasonably ignore the unequivocal words or conduct of a present co-tenant.

CONCLUSION

When the officers entered 800 West Lapeer without a warrant, they had neither exigent circumstances nor valid consent to do so. The officers thus performed precisely the "chief evil" the Fourth Amendment is designed to protect against: warrantless invasion of the home. They could have and should have gotten a warrant to support their effort even if it meant waking up a judge to do so.

ACCORDINGLY, IT IS ORDERED that Mr. Houston's motion to suppress (ECF No. 27) is **GRANTED.**

Dated: January 15, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE